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No.....At Law.

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff-in-Error,

vs.

KING COUNTY, Washington, a Municipal Corporation; Claud C. Ramsey, Lou C. Smith and Thomas Dobson, individually and as County Commissioners for King County, Washington,
Defendants-in-Error.

Writ of Error to the District Court for the Western District of Washington.

HON. EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR PLAINTIFF-IN-ERROR.

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STATEMENT OF THE CASE.

This case is before the court on a writ of error to the District Court of the United States for the Western District of Washington, Northern Division, and comprises a suit for the recovery of $5,719.04 alleged to be due by the defendants in error to the

plaintiff in error on account of the failure of the former to collect certain taxes alleged to be due under Title V of the Revenue Act of 1917 and Title V of the Revenue Act of 1918 with respect to amounts paid to the defendants in error for the transportation of freight and passengers on certain ferry boats maintained and operated by the said defendants in error.

THE FACTS.

King County, Washington, is a municipal corporation organized and existing under the laws of the State of Washington, having its principal office in the City of Seattle, County of King, Washington, and was existing as such from November 1, 1917, to January 1, 1921. Claud C. Ramsay, Lou C. Smith and Thomas Dobson were during the period aforesaid the duly elected, qualified and acting County Commissioners of King County, Washington. The defendants in error during the period aforesaid maintained and operated lines of ferry boats for the transportation of freight and passengers for hire along various routes between the City of Seattle, Washington, and different points within and without the County of King, Washington. During the said period the said defendants

in error collected sums of money from divers persons in payment for services and facilities rendered in transporting passengers and freight on the ferry boats aforesaid. Although being notified by a duly authorized agent of the United States that they should collect and pay over to the Collector of Internal Revenue for the District in which their principal office was located certain taxes with respect to moneys collected as aforesaid, the defendants in error wilfully failed, refused and neglected to collect such taxes or to pay the same to the said Collector of Internal Revenue.

STATUTES INVOLVED.

The pertinent statutes of the State of Washington relating to the powers and duties of Counties are as follows:

> "Sec. 3822. Powers of Counties as Bodies Corporate.—The several counties in this state shall have capacity as bodies corporate to sue and be sued in the manner prescribed by law; to purchase and hold lands within its own limits; to make such contracts, and to purchase and hold such personal property, as may be necessary to its corporate or administrative powers, and to do all other necessary acts in relation to all the property of the county. (L. '54, p. 329, Sec. 1; Cd. '81, Sec. 2653; 1 H. C., Sec. 2437.) (Rem. 1915.)

"Sec. 3824. Powers—How Exercised.—Its powers can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law. (Cd. '81, Sec. 2655; 1 H. C., Sec. 2459.) (Rem. 1915.)"

"Sec. 5013. County may Construct, Purchase or Condemn, Etc.—Any county within the state shall be and is hereby authorized to construct, or condemn and purchase, or purchase, operate and maintain a ferry across or wharf at any unfordable stream, lake, estuary or bay within or bordering on said county, together with all the necessary boats, grounds, roads, approaches and landings necessary or appertaining thereto, with full jurisdiction and authority to operate and maintain the same free or for toll, by and under the direction and control of the board of county commissioners of such county and as said board shall by resolution determine. (L. '95, p. 341, Sec. 2; L. '99, p. 39, Sec. 1.) (Rem. 1915.)"

The pertinent provisions of the Revenue Act of 1917 follow:

"Sec. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid (a) a tax equivalent to three per centum of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight con-

signed from one point in the United States to another; * * * (c) a tax equivalent to eight per centum of the amount paid for the transportation of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water, from one point in the United States to another or to any point in Canada or Mexico, where the ticket therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 35 cents, and a tax equivalent to ten per centum of the amount paid for seats, berths, and staterooms in parlor cars, sleeping cars, or on vessels. If a mileage book used for such transportation or accommodation has been purchased before this section takes effect, or if cash fare be paid, the tax imposed by this section shall be collected from the person presenting the mileage book, or paying the cash fare, by the conductor or other agent, when presented for such transportation or accommodation, and the amount so collected shall be paid to the United States in such manner and at such times as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. * * *"

"Sec. 501. That the taxes imposed by section five hundred shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered."

"Sec. 502. That no tax shall be imposed under section five hundred upon any payment received for services rendered to the United States, or any State, Territory, or the District of Columbia. The right to exemption under this section shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe."

"Sec. 503. That each person, corporation, partnership, or association receiving any payments referred to in section five hundred shall collect the amount of the tax, if any, imposed by such section from the person, corporation, partnership, or association making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under paragraph two of section five hundred and one to the collector of internal revenue of the district in which the principal office or place of business is located. Such returns shall contain such information, and be made in such manner, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe."

The Revenue Act of 1918 provides:

"Sec. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—

(a) A tax equivalent to 3 per centum of the

amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water, of property by freight transported from one point in the United States to another; * * *

(c) A tax equivalent to 8 per centum of the amount paid for the transportation on or after such date of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water from one point in the United States to another or to any point in Canada or Mexico, where the ticket or order therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 42 cents; * * *

(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe."

"Sec. 501. (a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered."

"Sec. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by

such section from the person making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under subdivision (c) or (d) of section 501 to the collector of the district in which the principal office or place of business is located."

THE ARGUMENT.

INTRODUCTORY.

There is only one point in dispute in this case, namely, whether a municipal corporation may constitutionally be required and is required, under the provisions of the Revenue Act of 1917 and the Revenue Act of 1918, to collect and pay over to the United States a tax with respect to amounts paid to such corporation for the transportation of passengers and freight on ferry lines maintained and operated by it. It is contended by the defendants in error that since King County, Washington, is a subdivision of the State of Washington the County Commissioners are officers and agents of the State engaged in the operation of a governmental enterprise and, hence, King County, its officers and agents are exempt from any Federal burden with respect to the conduct of such enterprise. On the other hand, the Government maintains that the operation

of a ferry, under the circumstances prevailing in the instant case, is a municipal or corporate, as distinguished from a purely governmental function and, hence, is not within the constitutional inhibition against the taxation of State instrumentalities by the Federal Government. It is further contended that even though it be conceded that the operation of the ferries in the instant case is a purely governmental function, engaged in by the defendants in error for the benefit of the public at large, the tax in question is imposed, not upon the State or a subdivision thereof, but upon the persons paying for the transportation services and facilities rendered by the defendants in error, and that the defendants in error could be, and were, required to collect the tax due with respect to the moneys so paid and received by them and pay the same over to the United States.

Not Exempted by the Act.

It is not claimed that the defendants in error are within any express exemption from the provisions of the taxing acts above quoted, but it is argued that an implied exemption is found in the language of Section 502 of the Revenue Act of 1917 and Section 500 (h) of the Revenue Act of 1918. If there

is any inference to be drawn from these provisions beyond the plain words used, it is that the exemption with respect to states therein provided is exclusive, and this exemption refers, in each case, *to amounts paid for services rendered to any State* and could not by any normal construction be held to apply to *amounts paid to a State for services rendered to private individuals.* These provisions were clearly inserted to avoid any constitutional objections to the Acts on the ground that they attempted to impose a tax on the expenditures of States. As will be pointed out later, the transportation tax is an excise tax, a tax on expenditures and there is no constitutional reason for assuming that Congress intended to exempt expenditures made *by individuals* in those cases where the payments were made *to States* or subdivisions thereof.

The Taxing Power of Congress.

But, it is claimed, that if these Acts are so construed as to impose upon the defendants in error the burden of paying the tax in question, the same are violative of that settled principle of the Federal Constitution which prevents the Federal Government from taxing the instrumentalities of the States. Thus it is sought to restrict the taxing power of

Congress. Of course Congress is a legislative body with delegated powers but the power to levy taxes, duties, imposts and excises, is expressly given in the Constitution and in the exercise of such power, as limited by the Constitution itself, the will of the legislative body furnishes the only restraint. As was stated in the case of *Veazie Bank v. Fenno*, 8 Wallace 533:

> "Nothing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent. This purpose is apparent, also, from the terms in which the taxing power is granted. The power is 'to lay and collect taxes, duties, imposts and excises, to pay the debt and provide for the common defense and general welfare of the United States.' More comprehensive words could not have been used. * * * There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution. * * * The comprehensiveness of the power, thus given to Congress, may serve to explain, at least, the absence of any attempt

> by members of the Convention to define, even in debate, the terms of the grant. The words used certainly describe the whole power, and it was the intention of the Convention that the whole power should be conferred."

Quoting from the opinion of the Court in the *License Tax Cases*, 5 Wall. 462, 471:

> "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

Any attempt therefore to circumscribe or limit the taxing power of Congress must be based upon the limitations expressly prescribed in the Constitution itself or arising by necessary implication. See *Pollock v. Farmers Loan and Trust Co.*, 157 U. S. 429.

LIMITATIONS ON THE TAXING POWER OF CONGRESS.

There are certain expressed limitations on the taxing power of Congress with which we are not at present concerned but as pointed out by Chief Justice Marshall in the case of *McCulloch v. Mary-*

land, 4 Wheat. 316, that which is implied is as much a part of the Constitution as that which is expressed and from the very nature of the dual form of Government created by the Constitution itself there arises the implied limitation on this power with which we are at present concerned. However it may be variously stated, this restriction prohibits the taxation by the Federal Government of the States with respect to their purely governmental functions. That the restriction is itself thus limited is apparent from an examination of those cases wherein the taxing power of Congress has been challenged on this basis.

The principle as announced and sustained by various subsequent decisions eminates from that memorable observation by the Chief Justice in *McCulloch v. Maryland*, *supra*, "That the power to tax involves the power to destroy." In that case the Chief Justice observed that the Federal Government by necessary implication was prohibited from destroying through taxation the powers reserved by the States and that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts; and to employ all necessary agencies for legitimate purposes of State gov-

ernment, are not proper subjects of the taxing power of Congress."

The scope of this prohibition, as thus announced, has not been extended by subsequent decisions. In *Collector v. Day*, 11 Wall. 127, it was held that it was not competent for Congress to levy a tax upon the salaries of judicial officers of a State, for the same reasons that it was held in *Dobbins v. Commissioners*, 16 Pet. 435, that a State could not tax the salaries of officers of the United States. The limitation was thus explained by the court:

> "It is admitted that there is no expressed provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the State, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self preservation; as any Government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that Government. Of what avail are these means if another power may tax them at discretion?"

In *United States v. Railroad Company*, 17 Wall. 322, the limitation was held to apply to municipal

revenues derived by the City of Baltimore from its ownership of stock in a railroad company. The reason for this ruling was thus stated by Mr. Justice Hunt:

> "The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other."

There was a like holding in the case of *Pollock v. Farmers' Loan and Trust Company, supra,* wherein the interest received from bonds issued by a State or any of its municipalities, were declared to be beyond the taxing power of Congress, for the reason that such a tax would impair the power of the State to borrow money, which was an inherent attribute of sovereignty, as well as one of the "reserved" powers of a State. (See also, *Mercantile Bank v. New York,* 121 U. S. 13, 162; *Weston v.*

Charleston, 2 Pet. 449, 468; *Evans v. Gore*, 253 U. S. 245, 255.)

Whatever may have been the law prior to the decision in the case of *South Carolina v. United States*, 199 U. S. 437, it was settled by that case that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character and does not extend to those which are used by the State in the carrying on of an ordinary private business. It was stated in the dissenting opinion in that case delivered by Mr. Justice White that by the decision the court had virtually overruled its former position on the question. As a matter of fact the precise question had never been presented to the court and although there is some suggestion in former cases that the States' exemption from Federal taxation was complete, all the cases theretofore decided involved the taxation by the Federal Government of instrumentalities of the State employed in purely governmental enterprises or the tax under consideration was such as to constitute a burden on some sovereign power of a State. That such was the boundary of this prohibition on the taxing power of Congress, was voiced as early as the decision in *Collector v. Day, supra*, when Mr.

Justice Bradley facetiously remarked in his dissenting opinion:

> "Where are we to stop in enumerating the functions of the State Governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps a percentage of the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? * * * I am as much opposed as anyone can be to any interference by the Federal Government with the just powers of the State Government."

Again in the *United States v. Railroad Company, supra*, it was said:

> "We admit the proposition of the counsel that the revenue must be municipal in its nature to entitle it to the exception claim. Thus, if an individual should make the City of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not in that action

> be an auxiliary or servant of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position. * * *"

The same suggestion is made in *Ambrosini v. United States*, 187 U. S. 1, 8:

> "The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and City in their ordinary governmental capacity. * * *"

In the *South Carolina* decision it is made clear that the broad taxing power of Congress had always theretofore been restricted in this respect from impairing only those powers "reserved" to the States upon the adoption of the Constitution or those powers inherently attaching to a sovereign and that those functions which were ordinarily performed by individuals belonged to neither of these classes. It was observed that the decision in the case of *Veazie Bank v. Fenno, supra*, was necessarily placed on the ground that the issuance of notes used for circulation was neither a sovereign nor a reserved power of a State, nor employed as an agency for a legitimate purpose of State government.

After reviewing the various decisions on the point Mr. Justice Brewer concluded for the court:

> "These decisions while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business."

Operation of Ferries as Private or Governmental Function.

Now since we must consider it settled that the exemption of State agencies from Federal taxation does not extend to those means or instrumentalities employed in the performance of its private functions, it is to be determined whether or not the operation of ferries by the defendants in error was, under the circumstances prevailing in the instant case, a private or corporate function as distinguished from purely governmental.

Now, King County is a body corporate with power to sue and be sued in its corporate name and, in general, occupies the same status and exercises the same powers as other municipal corporations (Sec. 3822, Rem. 1915). True, it is a subdivision of a State but, as other municipal corporations, has a dual character, the one public and the other private,

and exercises, correspondingly, twofold functions and duties. The one class of its powers is of a public character, in the exercise of which, its functions are political and governmental and such powers are exercised by virtue of its attributes of sovereignty. The other class of powers and functions relates to special or private corporate purposes, in the accomplishment of which it acts, not through its public officers *as such*, but through agents or servants employed by it. This dual character of municipal corporations is recognized in a long line of decisions: *Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79; *Simpson v. Whatcom*, 33 Wash. 392, 74 Pac. 577; *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605; *Kansas City v. Lemen*, 57 Fed. 905; *Hart v. Bridgeport*, 11 Fed. Cas. No. 6, 149, 13 Blatchf, 289; *Denver v. Porter*, 126 Fed. 288, and it is very generally held that in the exercise of its corporate or private functions, a municipal corporation stands upon the same footing and is charged with the same responsibility as a private corporation. *Normile v. Ballard*, 33 Wash. 369, 74 Pac. 566; *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273; *Denver v. Porter*, 126 Fed. 288; *South Carolina v. United States*, *supra*, and authorities cited. Not only does a municipal corporation occupy

the same status with respect to its responsibility for its acts as a private corporation in the exercise of its corporate functions but, as held in the *South Carolina* case, it is subject, in the same manner and to the same extent, to taxation by the Federal Government. After reviewing various decisions on the question the court said:

> "Now, if it be well established as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation."

While the distinction between the two classes of functions above discussed and the liability of a municipal corporation in the performance of each, is thoroughly established by the authorities, the decisions are not harmonious in designating the class

to which particular powers or functions belong. The same function has been held to be public in one case and private in another, while there is practical unanimity of opinion as to the application of the principle to other powers and duties.

However, eliminating those functions that have been the subject of conflicting decisions which might be termed as "border line" cases, some principles have been enunciated which are helpful in classifying particular powers and duties as public or private. Some of these principles will be enumerated:

1. Thus it is generally held that those powers *voluntarily* assumed and exercised by a municipal corporation and not imposed upon it as a *duty* of a sovereign to the general public, are private and corporate, although the exercise of such powers might and do inure ultimately to the benefit of the general public. *Oliver v. Worcester*, 102 Mass. 489; *Galveston Rosnainsky*, 62 Tex. 118; *White Lead Co. v. Rochester*, 3 N. Y. 463; *Hart v. Bridgeport, supra; Taggart v. Fall River*, 175 Mass. 325, 49 N. E. 622; *Barron v. Detroit* (Mich.), 40 L. R. A. 526.

2. Other functions are held to be private when they are performed for the immediate benefit or advantage of the corporation or the inhabitants of a particular locality although the general public may derive a common benefit therefrom. *Western Saving Fund Society*

v. Philadelphia, 31 Pa. St. 175; *Kansas City v. Lemen*, 57 Fed. 905; *Eastman v. Meredith*, 36 N. H. 284; *Maxmillion v. Mayor*, 62 N. Y. 160; *Esberg-Gunst Cigar Co. v. Portland*, 34 Ore. 282, 55 Pac. 961; *Wagner v. Portland*, 40 Ore. 389, 67 Pac. 300; *Hart v. Bridgeport, supra; Hill v. Boston*, 122 Mass. 344; *Bailey v. New York*, 3 Hill. 531; *Western College v. Cleveland*, 12 Ohio St. 377.

3. Again the fact that a municipal corporation makes a charge for services or facilities has been held sufficient to classify the furnishing of such services or facilities as a private function. *Esberg-Gunst Cigar Co. v. Portland, supra; People v. Detroit*, 28 Mich. 237; *Arline v. Laurens County*, 77 Ga. 249; *Lynch v. Springfield*, 174 Mass. 430; *Bodge v. Philadelphia*, 167 Pa. St. 492; *Kibell v. Philadelphia*, 105 Pa. St. 41; *Aldrich v. Tripp*, 11 R. I. 141; *Pittsburgh v. Grier*, 22 Pa. St. 54; *St. John v. MacDonald*, 14 Cn. Supt. Ct. 1.

4. Further, those functions which can be or are ordinarily performed by individuals, are generally held to be private in their nature. (See authorities cited above.)

Applying the foregoing principles to the operation of ferries, there can be little doubt that such an undertaking is properly classified, especially in the instant case, as a private, rather than a purely governmental, function. This is a *permissive power* granted and voluntarily assumed and not a *duty* im-

posed upon King County in its capacity as a local sovereign. It is a function in the accomplishment of which an individual is legally as competent to act as a sovereign. It was undertaken for the immediate advantage and benefit of the corporation and the inhabitants of local and adjacent territory, although it no doubt resulted in a common benefit to the public at large. The enterprise was undertaken by the corporation in its corporate and proprietary capacity and a charge was made for the services and facilities furnished.

The distinctions above made have been fully recognized and applied by the Supreme Court of the State of Washington and it is submitted that the decisions of this court are controlling so far as they classify the various functions performed by municipal corporations.

Thus, it has been held that the laying out, repair and control of streets by a municipal corporation are municipal and ministerial duties as distinguished from governmental duties, for a breach of which the corporation is liable. *Sutton v. Snohomish, supra; Normile v. Ballard,* 33 Wash. 369, 74 Pac. 566.

Likewise the laying out and constructing of high-

ways when performed by a county is not such a governmental function as relieves the county from liability to persons injured by negligence in constructing such highways. *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576.

Although there appear to be few decided cases relating to the operation of ferries, it has been held that a city in operating a ferry was acting as a common carrier and must be held to the ordinary duties and liabilities of a carrier. *Townsend v. Boston*, 187 Mass. 283, 72 N. E. 991. The liability of such municipal corporation as a common carrier is indisputable where it maintains a ferry and charges tolls for the services furnished. *Pittsburgh v. Grier*, 22 Pa. St. 54; *St. John v. MacDonald*, *supra.*

Conceding, therefore, the correctness of the suggestion that has been made that a ferry is a part of the highways of the county, a proposition which has been denied in a number of cases, it will be seen that the defendants in error cannot escape taxation on this ground for the reason that a municipal corporation in the State of Washington acts in its private corporate capacity in the maintenance of a highway and not in the discharge of a purely governmental function.

The proposition announced in the District Court, that the operation of a ferry is a governmental function, appears to have been based on the cases of *East Hartford v. Hartford Bridge Co.*, 10 How. 511, and *Slaughter House Cases*, 16 Wall. 36. Neither of these cases appears to be in point. The *East Hartford* case holds that the control of the location and operation of ferries was within the province of the State legislature and that a legislature could not by granting a franchise to a municipal corporation create such a contract right as would be impaired by the granting of a later franchise to another corporation. The *Slaughter House* cases merely decided that since the regulation of slaughter houses was within the police power of the State there was no taking of property without due process of law by granting exclusive franchises to a few persons and forbidding the conduct of such business by any other person.

There is a vast distinction between the control of a business and the operation of the business itself by the State. The authority of a State to legislate for the purpose of regulating the method of operating various businesses pursuant to its police power has often been sustained. In the *South Carolina* case it was determined by the court that the

regulation of the liquor business was a proper subject for the exercise of the police power of the State, and yet it was held that when the State engaged in the business itself it was performing a private, rather than a governmental, function. It is customary for municipal corporations to control the public utilities, to supervise show houses, to regulate the size and construction of buildings in various sections of the city pursuant to what are generally termed "zoning laws;" and yet it could never be contended that the operation of a show house or the building of residences in restricted areas are governmental functions although undertaken by a municipal corporation. The conclusion of the District Court seems to have been based on the failure to distinguish between the *regulation* of business and the *operation* of business.

The Tax Is Not on the State or Subdivision Thereof.

Now let it be conceded for the purposes of argument, that the operation of ferries under the circumstances prevailing in the instant case is a purely governmental function and that the defendants in error are not themselves subject to taxation with respect to such enterprise, it is yet not attempted by the taxing acts in question to violate the exemp-

tion granted to State instrumentalities. As has been suggested above, the transportation tax is an excise tax imposed upon expenditures made by persons for transportation services or facilities. It is specifically provided by section 501 of the Revenue Act of 1917 that,

> "* * * the taxes imposed by section five hundred *shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered,*"

and by section 501 (a) of the Revenue Act of 1918 that,

> "* * * the taxes imposed by section five hundred *shall be paid by the person paying for the services or facilities rendered.*"

Plainer language could not have been used in designating the person upon whom the tax is imposed. It is not contemplated by either act that the carrier should bear any part of the tax burden. True, the carrier is required to *collect* the tax and pay over the same to the collector, but this very requirement only makes it more conclusive that the tax is imposed upon the person paying for the transportation services. Thus it is provided by section 503 of the Revenue Act of 1917 that,

> "* * * each person, corporation, partnership, or association *receiving any payments* referred

> to in section five hundred *shall collect the amount of the tax*, if any, imposed by such section *from the person, corporation, partnership, or association making such payments*, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected * * * to the collector * * *."

So also it is provided by section 502 of the Revenue Act of 1918 that,

> "* * * each *person receiving any payments* referred to in section 500 *shall collect the amount of the tax*, if any, imposed by such section *from the person making such payments*, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected * * * to the collector * * *."

It is submitted that even a casual examination of the foregoing provisions will remove any doubt that the tax is under neither act imposed upon the carrier, but that it is merely charged with the collection of the same.

Requirement of Collection.

Although the Federal Government cannot tax instrumentalities of the State employed in purely governmental functions, there is no objection to requiring the State through its officers or agents to collect the tax due from persons paying money over

to such agents. This is well illustrated by the case of *National Bank v. Commonwealth*, 9 Wall. 353. After it had been held that a National Bank or its capital could not be subjected to taxation by a State, it was held in this case that there was no Constitutional objection to requiring a National Bank to collect a tax imposed upon the shareholders of the Bank and to pay the same over to the State Government. It was argued in that case that:

> "Without remuneration, and without right, the commonwealth of Kentucky is undertaking to force the plaintiff in error, in its corporate capacity, to collect this tax from its shareholders, and pay the same into the State treasury. Not only so, but penalties of a grave and serious character are imposed upon the bank and its officers in the event of neglect or refusal. Can this burden be imposed? * * * With great propriety the bank may say to the State: 'You have your assessing officers; send them to the bank; they will there find a list of all stockholders, let them assess for themselves the shares of stock for taxation; but you shall not transform our National agency into a State servant, and compel it to perform a burdensome duty, not enjoined by its charter.'"

In that case the law provided that if the tax was not paid the Cashier and his securities should be liable for the same, and twenty per cent, upon the amount and that the bank or corporation should

forfeit the privileges of its charter. In reply to this argument the court stated:

> "But it is argued that the banks, being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of *McCulloch v. The State of Maryland*, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the Government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the Government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the Government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are

designed to serve that Government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. * * * It is only when the State law incapacitates the banks from discharging their duties to the Government that it becomes unconstitutional. * * * If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the Government."

This case was cited with approval in a subsequent decision in the case of *Merchants' & Manufacturers' Bank v. Pennsylvania*, 167 U. S. 461, wherein it was pointedly held that a State had the right to make a National Bank its agent for the collection of a tax due from its individual stockholders.

Since, therefore, there is no objection to requiring

officers of a National Bank to collect a tax imposed by the State upon shareholders of the bank, there can certainly be no objection to requiring officers of a State or municipal corporation to collect and pay over to the United States taxes due with respect to money received by such officers in the ordinary course of business. This requirement in no way impairs their efficiency as agents of the State in the performance of their regular duties and is not within the reason of the rule which exempts States from taxation by the Federal Government. It can in no way impede or burden the operation of the ferry. If agents of the Federal Government may be compelled by State legislation, under penalty, to collect taxes due the State from individuals with whom such agents deal, conversely, and for identical reasons, officers and agents of the State are to the same extent amenable to Federal legislation and equally liable for failure to conform thereto.

Liability for Failure to Collect.

Now, if the foregoing propositions, or any of them, are sound, there was a duty imposed by law upon the defendants in error to collect a tax from the persons paying for the services and facilities furnished by them with respect to the payments so made. Failing in this duty they must be pre-

sumed to have elected to waive collection of the tax and to pay the same themselves.

But beyond any common law liability of the defendants in error arising as a result of the loss sustained by the Government on account of their failure to collect the taxes as aforesaid, there is a liability specifically imposed by the Revenue Act of 1918, which provides:

> "Sec. 1308 (a) That any person required under Titles V, VI, VII, VIII, IX, X, or XII, to pay, or to collect, account for and pay over any tax, or required by law or regulations made under authority thereof to make a return or supply any information for the purposes of the computation, assessment or collection of any such tax, who fails to pay, collect, or truly account for and pay over any such tax, make any such return or supply any such information at the time or times required by law or regulation shall in addition to other penalties provided by law be subject to a penalty of not more than $1,000. * * *
>
> (c) Any person who wilfully refuses to pay, collect, or truly account for and pay over any such tax shall in addition to other penalties provided by law be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. * * *"

Thus the Government looks only to the carrier. This penalty is imposed and this method of collection is employed not only as a matter of convenience but from the necessity of circumstances, arising from the fact that the cost of collection of the tax from the individuals paying for the facilities would exceed the amount of the tax collected. It was, therefore, competent for Congress to provide as it did that the tax should be collected in the manner aforesaid and to hold the carrier to a strict accounting for the amount of tax due.

CONCLUSION.

In conclusion the plaintiff in error submits that the decision of the District Court should be reversed because:

1. The defendants in error are not exempted from the provisions of the taxing acts in question.

2. The exemption of State agencies and instrumentalities from Federal taxation extends only to those employed in purely governmental functions and has no application to those employed by a municipal corporation in its corporate or proprietary capacity.

3. The operation of ferries, especially in the instant case, is a corporate or municipal, rather than a purely governmental, function and hence the agencies employed in such enterprise are not within the exempted class.

4. Conceding the operation of ferries to be a purely governmental function, the principle prohibiting Federal taxation of the governmental agencies of the State is not violated by the taxing acts in question, since the tax is imposed upon the person paying for the transportation services or facilities furnished and not upon the carrier furnishing such services or facilities.

5. There is no objection, constitutional or otherwise, to requiring purely governmental or other agencies of a State, to collect and pay over a tax due to the Federal Government with respect to moneys coming into the hands of such agents in the ordinary course of business.

6. On account of the wilful failure or refusal of such agents to perform the duty thus imposed, there arises a statutory, if not a common law, liability to the Federal Government for the amount of the tax which they have so failed or refused to collect.

Respectfully submitted,

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